A

HAZLINDA HAMZAH

v.

KUMON METHOD OF LEARNING CENTRE

B

COURT OF APEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASHIM YUSOFF JCA
MOHD NOOR ABDULLAH JCA
[CIVIL APPEAL NO. W-04-78-2004]

C

6 MARCH 2006

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - Application for judicial review to quash decision of Tribunal for Consumer Claims ordering respondent to make a partial refund to appellant -*

D *Whether Tribunal must give written decisions for its award - Whether oral reasons sufficient - Whether delay in producing written reasons casts doubts on its genuineness - Whether Tribunal committed an error of law - Consumer Protection Act 1999, s. 114*

E ***CONTRACT:*** *Service contract - Termination - Refund of fee - Claim brought before Tribunal for Consumer Claims - Whether there was absence of a total failure of consideration - Whether Tribunal erred in law in ordering a partial refund*

F The appellant, who had put her three children in a tuition centre run by the respondent, found the services rendered to be wanting and requested a refund of the fee she had paid the respondent. Since the respondent was not forthcoming, the appellant went to the Tribunal for Consumer Claims ('the Tribunal') and filed her claim there. The Tribunal found for her and ordered the

G respondent to make a partial refund, concluding that the appellant had in fact received some benefit. The respondent then applied to the High Court for judicial review to quash the Tribunal's decision. It succeeded, resulting in the present appeal to this court by the appellant. The sole ground on which the High Court

H quashed the Tribunal's award was that it had not given written reasons for its award. The respondent submitted that the appeal should not be allowed on two grounds: (i) that s. 114 of the Consumer Protection Act 1999 ('the Act'), which says that "The Tribunal shall in all proceedings give its reasons for its award in

I the proceedings", is mandatory in its language and that its breach warranted the issuance of *certiorari*; and (ii) that the High Court, having written to the Tribunal to give its reasons and having

adjourned the substantive application for judicial review on several occasions, was entitled to quash the award. Further, the Tribunal in its letter of 24 April 2003 had specifically said that no grounds had been issued, thereby casting doubt on the veracity of the written reasons of the Tribunal sent under cover of its letter of 20 August 2004.

Held (allowing the appeal)
Per Gopal Sri Ram JCA:

(1) In the first place, all that s. 114 of the Act says is that the Tribunal must give reasons for making its award. The section neither says that the reasons must be in writing nor does it fix any time limit for the delivery of the reasons. Having regard to the general scheme of the Act, it is sufficient if the Tribunal gives oral reasons since what is important is the speedy disposal of a dispute with oral reasons for the decision. If the need arises, the Tribunal may deliver written reasons at a later point in time and if it refuses to deliver any reasons – which was certainly not the case here – then the obvious remedy open to the respondent was to move the High Court for *mandamus* requiring the immediate production of the reasons. As it happened, there was a claim for *mandamus* here that was never pursued and the attention of the judicial commissioner ('JC') was not drawn to it. Instead, the respondent stood by while the High Court kept adjourning the proceedings to await written reasons, which was certainly unnecessary as there was no requirement for the Tribunal to produce written reasons. Therefore, there was no breach of s. 114 of the Act and certainly no warrant for the grant of *certiorari* in this case. (para 10)

(2) In the second place, the suggestion that there were never any reasons given by the Tribunal for making its award – a suggestion that apparently found favour with the JC – and that the written reasons actually produced lacked veracity was an unfair and unwarranted attack on the integrity of the learned chairman of the Tribunal who dealt with this case. Eddie Yeo was a very senior member of the Legal and Judicial Service who had served the Government with distinction and whose integrity is unquestionable, and to suggest that the delay in producing the written reasons casts doubts on its genuineness was most unfair. It was most unfortunate that the learned JC misinterpreted the letter of 24 April 2004 to mean that no reasons were ever given. She should have appreciated that the

Tribunal, unlike ordinary courts, is not enjoined by law to deliver written reasons. Even the ordinary courts often deliver decisions with short oral reasons followed at a later date with full written reasons. There was also no reason for the JC to have rejected the appellant's affidavit evidence setting out the oral reasons when there was no challenge to that evidence by the respondent, which did not even bother to attend the hearing before the Tribunal. (para 11)

(3) Finally, although the awards of the Tribunal are final (which means that they are final on the facts but not on the law), they are amenable to judicial review. The respondent submitted that the Tribunal committed an error of law because it ordered a partial refund of the consideration paid by the appellants to the respondent when there was absent here a total failure of consideration. With respect, it is to overcome this sort of technical common law rule that the Act conferred wide powers on the Tribunal. The Tribunal has the power to direct a refund and it did so in this case. Thus, there was no error of law at all here. (para 12)

[Orders of High Court set aside; substantive motion for judicial review dismissed.]

Case(s) referred to:

Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 ***(refd)***

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 FC ***(refd)***

R v. Medical Appeal Tribunal, ex p Gilmore [1957] 1 QB 574 ***(refd)***

R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Sangram Singh v. Election Tribunal AIR [1955] SC 425 ***(refd)***

Legislation referred to:

Consumer Protection Act 1999, ss. 97, 98, 99(2), 108(1), (2), 109, 110, 111, 112(1), (2), 114

Courts of Judicature Act 1964, para 1 Sch

Indian Constitution [Ind], art. 226

For the appellant - Jessica Ram Binwani; M/s Meena Raman & Partners

For the respondent - Ling Young Tuen (Wan Soo Khwan with her); M/s SK Wan & Partners

[Appeal from High Court, Kuala Lumpur; Revision No: R2-25-79-03]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] The respondent runs a tuition centre. The appellant put her three children in it. Like many parents she wanted her children's English and Mathematics to improve: for them to do well in their studies. But she found the services rendered by the respondent to be wanting. She was very disappointed. She wanted a refund of the fee she had paid the respondent. The respondent was not forthcoming. So she went to the Tribunal for Consumer Claims ("the Tribunal") and filed her claim there. The Tribunal found for her. It ordered the respondent to make a partial refund. That is because it concluded that the appellant had in fact received some benefit. The respondent then applied to the High Court for judicial review to quash the Tribunal's decision. It succeeded. The Tribunal's award was quashed. The appellant appealed to us.

[2] Formerly such a case such as this, where a consumer complains of defective products or services, would have had to have been filed in the Magistrate's Court. The disposal of the case would take ages. And there was no hope of recovering anything unless it was established that there was a total failure of consideration. This is because of the decision in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32. Consumers were therefore in a very disadvantaged position. They had little or no protection. Almost always it was the defaulting tradesman who gained.

[3] It was to remedy this injustice that Parliament enacted the Consumer Protection Act 1999 ("the Act") which came into force on 15 November 1999. Its long title sets out its general objective. It says this:

> An Act to provide for the protection of consumers, the establishment of the National Consumer Advisory Council and the Tribunal for Consumer Claims, and for matters connected therewith.

[4] It has several important provisions, some of which are more beneficial than those found in the Sale of Goods Act 1956. They apply to both goods and services. The purpose of those provisions is to protect consumers from the provision of defective goods and services and to give claimants speedy relief. Parliament knew that if matters were left to the ordinary courts, the protection it had

set about giving to consumers would be rendered illusory. So it established the Tribunal. A few words must be said about the way it functions and its powers.

[5] The jurisdiction of the Tribunal is limited to hearing claims not exceeding RM25,000 (s. 98) and proceedings before it are commenced by lodging a claim with it in the prescribed form (s. 97) within three years of the claim accruing (s. 99(2)). Parties are entitled to attend and be heard (s. 108(1)) but are not entitled to legal representation (s. 108(2)). The Act in s. 109 requires the hearings of the Tribunal to be open to the public and by s. 110 empowers the Tribunal to take evidence and "to generally direct and do all such things as may be necessary or expedient for the expeditious determination of the claim." The words to which emphasis has been supplied reflect the central theme of the Act, namely, the speedy disposal of consumer claims. You will find it repeated in s. 112(1) of the Act which requires the Tribunal to make its award "without delay and, where practicable, within sixty days from the first day the hearing before the Tribunal commences".

[6] The Tribunal has very wide powers. These are to be found in s. 112(2) which, among other things, enables the Tribunal to direct the payment of money or to direct the refund of the consideration paid for goods or services or to direct payment of compensation or to vary or set aside a contract wholly or in part. Its powers are exercisable even in the event that the party complained against fails to appear at the hearing. (See s. 111 of the Act.)

[7] Section 114 of the Act is of particular relevance to the present instance. It says that: "The Tribunal shall in all proceedings give its reasons for its award in the proceedings." The section is relevant because in the present instance, the sole ground on which the High Court quashed the Tribunal's award was that it had not given written reasons for its award. This is how the matter arose.

[8] When the matter came on for hearing on 15 April 2003, the respondent was absent. The Tribunal then handed down its award requiring the respondent to make a partial refund. This was later reduced into writing in the form of an award and sent to the parties. In the letter of the Tribunal's chairman, Mr. Eddie Yeo Soon Chye which is dated 24 April 2003 quoted in extenso by the learned judicial commissioner in her judgment, there is reference to the award that was handed down on 15 April 2003.

The letter goes on to say that no grounds of judgment were issued. In point of fact, the oral reasons for the award were given. Written reasons were made available under cover of a letter dated 20 August 2004. In the meantime the judicial commissioner had already delivered her judgment on 24 May 2004 whereby she quashed the award for breach of s. 114 of the Act. However, the appellant had by way of her affidavit delivered in opposition to the judicial review application made available to the High Court her note of the oral reasons given by the learned chairman when he made his award on 15 April 2003. If you look at her note and compare it with the written reasons later furnished by the Tribunal you will find that they match. The judicial commissioner rejected the appellant's note on the ground that the Tribunal had in its letter of 24 April 2003 stated that no grounds of judgment had been issued.

[9] Before us, learned counsel for the respondent (whom we called upon to address us as to why the appeal should not be allowed) made two submissions. The first is that s. 114 is mandatory in its language and that its breach warranted the issuance of *certiorari*. The second is that the High Court having written to the Tribunal to give its reasons and having adjourned the substantive application for judicial review on several occasions was entitled to quash the award. Further, the Tribunal in its letter of 24 April 2003 had specifically said that no grounds had been issued, thereby casting doubt on the veracity of the written reasons of the Tribunal sent under cover of its letter of 20 August 2004. Both these submissions lack any merit.

[10] In the first place, all that s. 114 says is that the Tribunal must give reasons for making its award. The section does not say that the reasons must be in writing. Nor does it fix any time limit for the delivery of reasons. Having regard to the general scheme of the Act it is sufficient if the Tribunal gives oral reasons. What is important is the speedy disposal of a dispute with oral reasons for the decision. If the need arises, the Tribunal may deliver written reasons at a later point in time. If the Tribunal refuses to deliver any reasons – which is certainly not the case here – then the obvious remedy open to the respondent was to move the High Court for mandamus requiring the immediate production of the reasons. As it happens, there was here a claim for mandamus. But it was never pursued. The judicial commissioner's attention was not drawn to it. Instead, the respondent stood by while the High Court kept adjourning the proceedings to await written

reasons. This was certainly unnecessary as there is no requirement for the Tribunal to produce written reasons. It follows from what has been said thus far that there was no breach of s. 114 of the Act. There was therefore certainly no warrant for the grant of *certiorari* in this case.

[11] In the second place, the suggestion that there were never any reasons given by the Tribunal for making its award – a suggestion that apparently found favour with the judicial commissioner – and that the written reasons actually produced lack veracity is an unfair and unwarranted attack on the integrity of the learned chairman of the Tribunal who dealt with this case. Mr. Eddie Yeo was a very senior member of the Legal and Judicial Service. He served the Government with distinction. His integrity is unquestionable. To suggest that the delay in producing the written reasons casts doubt on its genuineness is most unfair. It is most unfortunate that the learned judicial commissioner misinterpreted the letter of 24 April 2003 to mean that no reasons were ever given. She should have appreciated that the Tribunal unlike ordinary courts is not enjoined by law to deliver written reasons. Even the ordinary courts often deliver decisions with short oral reasons followed at a later date with full written reasons. There was also no reason for her to have rejected the appellant's affidavit evidence setting out the oral reasons when there was no challenge to that evidence. How could there be any challenge? After all, the respondent did not even bother to attend the hearing before the Tribunal.

[12] There remains one final matter which requires mention. As already observed, the Tribunal is a specially constituted body to speedily deal with consumer's complaints. Although its awards are final (which means that they are final on the facts but not on the law: *R v. Medical Appeal Tribunal, ex p Gilmore* [1957] 1 QB 574) they are amenable to judicial review. It is the submission of learned counsel for the respondent that the Tribunal committed an error of law because it ordered a partial refund of the consideration paid by the appellant to the respondent when there was absent here a total failure of consideration. With respect, it is to overcome this sort of technical common law rule that the Act conferred wide powers on the Tribunal. As already demonstrated, the Tribunal has the power to direct a refund. It did so in this case. So there is no error of law at all here.

[13] Being a specialist body, the Tribunal has been conferred with extraordinary powers to do speedy justice for consumers. As such, its awards should not be struck down save in the rarest of cases, where it has misinterpreted some provision of the Act in such a way to produce an injustice. For courts should be ever remindful that *certiorari* is not a remedy that is available as of right. It is a discretionary remedy. It is not every error of law committed by an inferior Tribunal that entitles the High Court to issue *certiorari*. It must be demonstrated that the error has occasioned an injustice in a broad and general sense. This principle was laid down by the Federal Court in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687 and in *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 where the following passage in the judgment of Bose J in *Sangram Singh v. Election Tribunal* AIR [1955] SC 425 was applied with approval:

> That, however, is not to say that the jurisdiction (to issue *certiorari*) will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under Art 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognized lines and not arbitrarily; and one of the limitations imposed by the courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. *They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be.* Therefore, writ petitions should not be lightly entertained in this class of case. (emphasis added.)

[14] Two points need to be made. First, that art. 226 of the Indian Constitution is in essence identical to para. 1 of the Schedule to the Courts of Judicature Act 1964. Second, the words in the judgment of Bose J to which emphasis has been lent above are entirely apposite to the Tribunal established by the Act.

[15] At the conclusion of the arguments on 6 February 2006, this appeal was allowed. The orders of the High Court were set aside. The substantive motion for judicial review was dismissed. It was also ordered that the appellant was to have the costs occasioned here and in the court below. The deposit was ordered to be refunded to the appellant.